SUPREME COURT, U. S.

JAN 19 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-876

JESUS CONTRERAS, et al., *Petitioners,*

vs.

GROWER SHIPPER VEGETABLE ASSOCIATION OF CENTRAL CALIFORNIA, et al., *Respondents.*

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondents respectfully pray that the Petition for Writ of Certiorari requested by Petitioners to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled proceeding on September 7, 1973, be denied.

OPINIONS BELOW

Respondents adopt for purposes of this brief the material in Petitioner's Petition under the heading "Opinions Below."

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a group of farm workers has standing to bring a class action on behalf of all such workers for treble damages under Section 4 of the Clayton Act (15 U.S.C. § 15) against their employers for work purportedly lost when the employers allegedly engaged in a conspiracy to raise prices by limiting production.

STATUTES INVOLVED

The relevant statutes involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

This is an antitrust action brought under the Sherman Antitrust Act (15 U.S.C. § 1, § 2) and the Clayton Act (15 U.S.C. § 15) (CR 2:17-20; 262:26-28).[1] The Complaint, filed on September 3, 1970, alleges that respondents—growers and shippers of iceberg lettuce (CR 2:25-30), and their "trade association"—entered into a contract, combination, and conspiracy to restrain interstate trade in iceberg lettuce and thereby raise and fix the price of the lettuce at an artificially high and noncompetitive price (CR 4:2-5). Petitioners allege that the overt actions in furtherance of

1. "CR references are to the Record of Appeal which is on file in the Court of Appeal below.

the antitrust violations consist of limiting the total amount of iceberg lettuce produced and sold each year (CR 4:14-16).

Petitioners allege they have been "injured in their business or property" by acts of the respondents in that they have lost employment opportunities due to reduced production and harvesting of the lettuce, which petitioners claim reduced the hours per day and days per year worked by agricultural employees (CR 4:20-26); petitioners' alleged *conspiracy,* however, does not accuse respondents of doing any of the above acts.

Petitioners bring this action on their own behalf and as representatives of all farm workers who are now or have, since September 15, 1966, been employed by respondents in growing, harvesting, and/or processing iceberg lettuce (CR 3:11-15).

Respondents herein filed a Motion for Summary Judgment (CR 36, 37), which the Court and the parties have treated as a Motion to Dismiss the Complaint for failure to state a claim upon which relief can be granted on the ground that petitioners lack the requisite standing to sue. (CR 263:11-14).

After a hearing before the District Court, and the filing and consideration of briefs of all parties, U. S. District Judge Alphonso J. Zirpoli granted the respondents' Motion to Dismiss the Complaint (CR 263-264), and Judgment dismissing the petitioners' action was filed May 21, 1971 (CR 275, Item 39).

Petitioners appealed to the Court of Appeals for the 9th Circuit by Notice of Appeal filed April 20, 1971. The Court of Appeals in a per curiam decision dated September 7, 1973, unanimously affirmed the judgment below. From that decision petitioners seek review in this Court by a Petition for Writ of Certiorari.

ARGUMENT

A. There Is No Conflict Among Court Decisions in Applying the "Standing Doctrine" of Section 4 of the Clayton Act (15 U.S.C. § 15).

1. THE "STANDING DOCTRINE" IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The 9th Circuit's long established "standing doctrine"[2] as applied to Section 4 of the Clayton Act (15 U.S.C. § 15), has been recognized by this Court in *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), reversing 396 F.2d 809 (9th Cir. 1968) and more recently in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

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2. The standing doctrine has been defined as follows:

"'Standing' under Section 4 actually encapsulizes two distinct ingredients. First, a plaintiff must demonstrate that the interests allegedly injured by the defendant fall within the scope of antitrust protection. This requirement, which arises from judicial constructions of 'business or property' and 'by reason of', is satisfied in the manner set forth in our opinion. A second and distinct ingredient demands that a plaintiff show that the defendant's conduct contributed to his injury. This cause-in-fact requirement also derives from 'by reason of'. Once these two standing issues are resolved in favor of a plaintiff, the court can proceed to determine if the defendant's conduct violated the antitrust laws and, then, to ascertain the consequent damages."

In re Multidistrict Vehicle Air Pollution, M.D.L., No. 31, 481 F.2d 122 at 129 n. 11 (9th Cir. 1973), *cert. denied, sub nom. Morgan v. Automobile Manufacturers Assn., Inc.*, ... U.S. ..... (Nov. 19, 1973, No. 73-394, 38 L Ed 2d 336)

Furthermore, the 9th Circuit has traditionally defined the "by reason of" part of the standing doctrine, also labeled "target area", as requiring the injured party to ". . . show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the antitrust laws."

Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 at 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). *See* also *Hoopes v. Union Oil Company*, 374 F.2d 480 (9th Cir. 1967); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 at 220 (9th Cir. 1964), *cert. denied*, 379 U.S. 880 (1964); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 at 362 (9th Cir. 1955).

In *Perkins* the major concern was whether "fourth level" price discrimination is illegal under Section 2 of the Clayton Act as amended by Section 13 of the Robinson-Patman Act (15 U.S.C. § 13). The plaintiff had an additional claim under Section 4 for alleged injuries from failure to receive brokerage fees for securing gasoline, rental on leases of service stations, and payment of other indebtedness. This Court's reversal of the Section 4 issue was based in part upon the recognition that the panel of the 9th Circuit that decided the lower *Perkins* case (*Standard Oil Co. v. Perkins,* 396 F.2d 809 (9th Cir. 1968) misapplied *Karseal Corp. v. Richfield Oil Corp.,* 221 F.2d 358 (9th Cir. 1967). As the Court said,

> ". . . For this proposition the Court of Appeals cited *Karseal Corp. v. Richfield Oil Corp.,* 221 F.2d 358, 363, which held that 'the rule is that one who is only *incidentally* injured by the violation of the antitrust laws,—the bystander who was hit but not aimed at,—cannot recover against the violator.' It is clear in this case, however, that Perkins was no mere innocent bystander; he was the principal victim of the price discrimination practiced by Standard." *Perkins,* supra, at 649.

By employing this language it is clear that this Court recognized the 9th Circuit's "standing doctrine" as developed by the Circuit Court in *Karseal,* supra.

In 1972, this Court gave further recognition and acceptance to the rationale of the "standing doctrine" cases in *Hawaii,* supra. A major issue in that case was whether or not the State of Hawaii had standing to sue under provisions of Section 4 for injuries to its general economy by reason of violations of antitrust laws. This Court held:

> "Like the lower courts which have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests or enter-

> prises. [citations omitted] When the State seeks damages for injuries to its commercial interest, it may sue under Section 4. But, where as here, the State seeks damages for other injuries, it is not properly within the Clayton Act." *Hawaii*, supra, at 264.

This Court recognized that the lower courts developed a "standing doctrine" limiting those eligible to bring antitrust suits under Section 4.

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." [citations including *Hoopes v. Union Oil Company*, 374 F.2d 480, 485 (9th Cir. 1967)] *Hawaii*, supra, at 262-263 Note 14

Petitioners' reliance on *Radovich v. National Football League*, 352 U.S. 445 (1957) is misplaced. There can be no clearer case than *Radovich* of a target which has been directly aimed at and used as the means of accomplishing an illegal combination. Radovich, one of several football players "blacklisted" for jumping football leagues, was specifically listed as *the target* and the result of the allegedly illegal acts directly injured him in a commercial skill, quality or interest which he had acquired by reason of his unique ability and saleable qualities as a football player.

2. THERE IS NO CONFLICT AMONG THE VARIOUS CIRCUITS.

Petitioners argue that there exists direct conflict among the various circuits concerning the application of the "standing doctrine". In truth, such conflict does not exist. At most there has been a difference in "labels" or "analytical techniques" at arriving at similar results. In June of 1973 in *In re Multidistrict Vehicle Air Pollution, M.D.L.*,

No. 31, 481 F.2d 122 (9th Cir. 1973), *cert. denied, sub nom. Morgan v. Automobile Manufacturers Assn., Inc.*, ... U.S. ..... (November 19, 1973, No. 73-394; 38 L. Ed. 2d 336), the 9th Circuit wrote an in-depth opinion analyzing the standing doctrine as it is applied to Section 4 of the Clayton Act by the various circuits and clearly showed that no conflict exists.[3]

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3. These distinctions were discussed *In Re Multidistrict Vehicle Air Pollution, M.D.L. 31*, supra,

"[6]We have employed the terms "target area" and "direct injury" only as convenient, shorthand methods of identifying the two major approaches to the interpretation of "by reason of". Use of either label in other cases, in contrast, has frequently suggested an approach opposite that so denominated here. *E.g.*, Perkins v. Standard Oil Co., 396 F.2d 809 (9th Cir. 1968) (court labeled approach "target area" but employed the "direct injury" analysis), *rev'd*, 395 U.S. 642 (1969). Likewise, some courts have failed to perceive significant distinctions between the tests. *E.g.*, Nationwide Auto Appraiser Serv., Inc. v. Ass'n of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967). *It is to be hoped that the resolution suggested in our present opinion will obviate the use of either label in the future.* [Emphasis added]

"[7]We do not mean to imply that each circuit falls neatly into one of the two pigeonholes. Only the Eighth Circuit and ours, for example, have consistently followed the "target area" approach, *e.g.*, Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 688-89 (8th Cir. 1966) (Blackmun, J.), and even they have diverged occasionally. *E.g.*, Perkins v. Standard Oil Co., *supra* note 6. The First, Third, Sixth and Tenth Circuits, on the other hand, generally apply the test we label "direct injury". *E.g.*, Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir. 1973); Kauffman v. Dreyfus Fund, 434 F.2d 727, 732-34 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 394-95 (6th Cir. 1962); Miley v. John Hancock Mut. Life Ins. Co., 148 F.Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957). The Second, Fourth and Fifth Circuits have formulated their own particular mixtures of the two tests, *e.g.*, Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971); Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967); South Carolina Council

Petitioners have continually tried to apply the "salesman" cases[4] as authority to support their position that they should have standing under Section 4 and that these cases are in direct conflict with the 9th Circuit's holding in this case. In each of the "salesman" cases the alleged antitrust violation was directly "aimed at" the particular plaintiff's commercial assets and the Courts recognized that if a particular commercial ability achieved by individual plaintiffs is within the area of the economy affected by antitrust violations, then that "business or property" should be protected by the antitrust laws.

The fire equipment salesman in *Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942) allegedly lost his sales area, and, thereby, his commercial investments in the sales area which he had developed. The advertising salesman in *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (2d Cir. 1948) allegedly lost accounts which he had developed when they were transferred to a competitor. The commission book salesman in *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967) alleged that he had lost customers by reduction of his sales territory and that he was later

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of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966), although the approach of the Second more closely resembles the "direct injury" test and that of the Fourth and Fifth, the test of "target area". The Seventh Circuit's approach is uncertain, although it appears closer to "target area". *Compare* Sandidge v. Rogers, 256 F.2d 269 (7th Cir. 1958) *with* Congress Building Corp. v. Loews, Inc., 246 F.2d 587 (7th Cir. 1957). In ascribing positions to the various Circuits, we have ignored self-descriptions and have attempted to analyze their actual approaches."

In Re Multidistrict Vehicle Air Pollution, M.D.L. 31, Footnotes 6 and 7. *See* also text discussion at pages 124-128.

4. *Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942); *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (2d Cir. 1948); and *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967);

terminated by reason of his employer's acquisition of a competitor in violation of the antitrust laws. All of these cases represent instances in which the injured plaintiff possessed a unique commercial asset in the area of the economy endangered by a breakdown of competitive conditions and is consistent with the standing doctrine.

Petitioners cite *Wilson v. Ringsby Truck Lines, Inc.*, 320 F. Supp. 699 (D.C. Colo., 1970), a 10th Circuit District Court case. *Wilson* has been specifically disapproved by the 10th Circuit Court. *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 at 733 (10th Cir. 1973), *cert. denied* ..... U.S. ..... (April 16, 1973, 93 S.Ct. 1900) *rehearing denied.*

B. The Decision of the Court of Appeals in the Instant Case Is Consistent to the National Antitrust Policies as Articulated by This Court.

The decision in *Hawaii v. Standard Oil Co.*, supra, discussed above, recognized that the provisions of Section 4 and the opportunity for recovery of treble damages should be limited to parties who have been injured in their commercial interest or enterprises, and should not be extended to all injuries that might be conceivably traced to an alleged antitrust violation. *Hawaii*, supra, at 262-263 Note 14 and at 264.

The logic discussed above from *Hawaii*, supra, was the basis for the decision that the State of Hawaii did not have standing to sue for injuries to its general economy, and should serve as authority that Section 4 does not apply to all injuries caused by an alleged antitrust violation and supports the rationale of the "standing doctrine" as applied in petitioners' case.

The purpose of the conspiracy alleged by petitioners in this case was admittedly to raise prices by reducing production, not to restrict working hours of farm workers.

As a result, the District Court and the 9th Circuit Panel both held that petitioners' alleged injuries are not protected by the provisions of Section 4.

CONCLUSION

Within the last ten years this Court has repeatedly refused to grant certiorari on the "standing doctrine" cases from this circuit, *e.g., Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190 (9th Cir. 1969), *cert. denied,* 379 U.S. 880 (1964); and *In re Multidistrict Vehicle Air Pollution, M.D.L. No. 31,* supra; and from other circuits, *e.g., Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.,* 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.,* 308 F.2d 383 (6th Cir. 1962), *cert. denied,* 372 U.S. 907 (1963); and *Reibert v. Atlantic Richfield Co.,* supra. This repeated denial of certiorari would appear to indicate that this Court does not feel that a conflict on the standing doctrine exists among the various Courts meriting review.

The Writ of Certiorari requested by petitioners should be refused because 1) this case is consistent with the standing doctrine recognized by this Court; 2) there is no conflict among the circuits in applying the doctrine; and 3) that doctrine is not contrary to national policy.

Respectfully submitted,

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